In our view the same duty would also apply to the appellant as a motorcyclist in similar circumstances. But was the respondent wholly to be absolved from blame? He had been following the appellant for half a mile, travelling at about 35 m.p.h. He himself must have noticed that the appellent had slowed down and he also saw a junction 50 feet ahead. Would merely giving two signals before overtaking relieve him of any responsibility for the accident in the circumstances of the case? We do not think so.

We accordingly apportion the appellant's share of the blame as 75% and the respondent 25%.

As regards special damages and future loss of earning, they had been agreed. As stated in the grounds of judgment of the learned Judge there was only the quantum on general damages before the trial Judge but no award was however made. We would like to repeat what Gill F.J. (as he then was) said in this court in *Yeoh Cheng Han* v. *Official Administrator.*[5]

"Coming to the question of damages, it is a matter for regret that the learned Judge did not proceed to assess them on the assumption that the matter might go up to a higher court. As has been said in some cases before, it is very desirable for a trial judge to do so even if he comes to the finding that the action must fail."

We accordingly remit the case back to the trial Judge for assessment of general damages.

Costs to the appellant to be taxed. Deposit it to be refunded.

Order accordingly.

Solicitors: *James Foong & Anad; V.P. Nathan & Partners.*

APEX PHARMACY HOLDINGS SDN. BHD. v. CHEE CHIN

[F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F.JJ.) May 20 & July 13, 1984]

[Kota Bharu – Federal Court Civil Appeal No. 303 of 1983]

Contract – Agreement for Lease – Lessor purporting to be registered owner of premises – Lessor not a native of Kelantan – Attempt to circumvent the law and deceive the public authority – Agreement void – Whether person who paid premium for lease entitled to refund – Kelantan Land Enactment, 1938, s. 104 – Contracts Act, 1950, s. 66.

In this case the appellant sued the respondent for the refund of $15,000/- paid as premium under an agreement of lease. In the agreement the respondent was described as the registered owner of the land. In fact he was not the registered owner and he so described himself to circumvent the provisions of section 104(1) of the Kelantan Land Enactment. The respondent was not a native of Kelantan. The learned President of the Sessions Court dismissed the appellant's, claim and the appeal before the High Court was also dismissed. The appellant appealed.

Held: (1) since the respondent was not a person qualified to grant a lease and since the agreement was for the avowed purpose of deceiving a public authority, the agreement must be regarded as void and of no effect. Under section 66 of the Contracts Act the appellant was accordingly entitled to a refund of the premium;

(2) after the notice of repudiation by the respondent the parties agreed to have a tenancy conditional upon the installation of electricity in the premises. The installation of electricity was delayed and the appellant was entitled to rescind the agreement. However its claim for damages was not supported by satisfactory evidence and should be dismissed.

Cases referred to:

(1) *Arkwright* v. *Newbold* (1880) 17 Ch.D. 301, 328.
(2) *Lee Pooi Chun* v. *Lee Kah Gee* [1971] 2 M.L.J. 67.
(3) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143.
(4) *Margaret Chua* v. *Ho Swee Kiew & Ors* [1961] M.L.J. 173.
(5) *Parker* v. *Taswell* 2 De G. & J. 559; 44 E.R. 1106

FEDERAL COURT.

Datuk H.L. Wrigglesworth for the appellant.
C. Jegathesan for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The appellant, Apex Pharmacy Holdings Sdn. Bhd., sued the respondent in the Sessions Court at Kota Bharu for the refundment of a sum of $15,000/- paid as premium under an agreement for a lease dated February 6, 1980. The learned President of the Sessions Court dismissed the claim with costs. The appeal before the learned Judge of the High Court Kota Bharu was also dismissed with costs.

The statement of claim before the Sessions Court described what was thought to be the

issues sought to be tried. The first issue was stated in paragraph 4 and the second issue was stated in paragraphs 6 and 7 of the statement of claim. For convenience these paragraphs are reproduced below.

"4. The defendant was not the registered owner of the said premises but falsely misrepresented himself to be so in the said agreement."

"6. Under the terms of Clause 1 of the said agreement the tenancy was to begin on the 1st April, 1980 but the defendant was not able to give possession of the said premises to the plaintiff on the said date as provided under the terms of the said agreement."

"7. The failure of the defendant to give possession of the said premises to the plaintiff on the said date has caused the plaintiff great expense and loss in business resulting from the plaintiff having to make alternative arrangements for the lease of other premises with consequential delay in commencing business."

The defence's answer to these issues on the pleadings was as follows. First, it was contended that the plaintiff company knew that the defendant was the *de facto* owner of the premises and the *de jure* owner of the premises was merely holding the premises for the defendant, 'with the view to circumvent the provision of section 104 of the Kelantan Land Enactment No. 26 of 1938." Secondly the defendant delivered vacant possession of the premises to the plaintiff soon after the execution of the agreement and maintained that it was the plaintiff company that breached the contract.

If the agreement is void then by virtue of section 66 of the Contracts Act the appellant would be entitled to the refundment of the $15,000/-. If the agreement is voidable then if it is voidable at the option of the appellant then by virtue of section 76 of the Contracts Act the appellant would be entitled to damages and the refundment of the $15,000/-.

The director of the appellant company (PW 1) testified that with the help of his lawyer (PW 2) he entered into an agreement (AB 3-11) with the respondent on February 6, 1980. It was expressly stated as an agreement for a lease for a period of ten years commencing from April 1, 1980 at a monthly rental of $1,200/- payable in advance on the 1st of each month. The preamble of the agreement cited the "First Party" (the respondent) as "the registered owner of the premises" which statement was subsequently admitted to be false. On executing the agreement PW 1 paid a premium of $15,000/- to the respondent. The learned President after hearing the evidence found *inter alia* that the evidence adduced by the plaintiff had departed from the pleadings and had brought a new cause of action inconsistent with the pleadings.

On appeal to the High Court the learned Judge dismissed the appeal because he was of the opinion that the cause of action was not fraudulent misrepresentation but that the plaintiff was not given possession of the premises as promised and this claim was not supported by the evidence adduced at the trial.

We will now deal with the points raised. First, on the question of pleadings. We are of the opinion that the statement of claim complied sufficiently with the requirements of Order 14 of the Subordinate Court Rules. As regards the allegation of false misrepresentation we are of the opinion that the evidence adduced at the trial was not really inconsistent with the pleadings. We do not think that the absence of the particularisation of the fraud is fatal in the circumstances. We also do not think that the respondent had been taken by surprise or unable to meet the appellant's case. It is our view that the pleadings are sufficient to support a relief. It would seem to us that the statement of claim ought to be regarded as a case of rescinding a contract as an alternative to an action for deceit.

It is essential in law that if misrepresentation is to have legal effect it should have operated on the mind of the representee, and the burden of proving this lies on the representee himself in this case, PW 1. See also judgment of Lush, L.J. in *Arkwright* v. *Newbold.*[1] In this case PW 1 himself said he was "never misled" (page 19). It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew that it was false, he has no remedy. See also *Chitty* on Contracts, 23rd Edition, page 131. Thus one may find it odd for PW 1 to elect to sue on the grounds of alleged false misrepresentation. This, however, was explained by him in his own evidence (at page 19) that it was only after taking another premises that he decided "to fall back on the point" that the respondent had misled him.

It was also contended by the appellant that the agreement was void because the respondent des-

cribed himself falsely in the agreement as the registered owner of the premises in order to circumvent the provisions of section 104(1) of the Kelantan Land Enactment. There is here a self-admitted attempt to defraud a public authority. According to section 104(1) of the Enactment, the Land Registrar shall refuse to register a lease of land by a native of Kelantan to a party who is not a native of Kelantan until the transaction has received the sanction of His Highness the Sultan in Council. Any such lease without the previous sanction of His Highness the Sultan in Council shall be null and void. The respondent was not the registered owner of the land during the material period and it is not disputed that the respondent is not a native of Kelantan.

We feel that the issue here is simple enough. The agreement purports to grant a lease for ten years. It is a fact that the respondent was not the registered proprietor under the National Land Code at the material time and therefore not one qualified to grant a lease under the Code. Since the respondent was not a person qualified to grant a lease and since the agreement was for the avowed purpose of deceiving a public authority, the agreement must be regarded as void and of no effect.

The attitude of the courts in such matter has been consistent. In *Lee Pooi Chun* v. *Lee Kah Gee*[2] the Federal Court refused to recognise any legal right of the claimant because the written agreement was made with the view to evade the rent control law and therefore the claimant was practising a deceit on the public administration. See also *Palaniappa Chettiar* v. *Arunasalam Chettiar*[3] where the respondent had practised deceit on the public administration for his personal gain. Under section 66 of the Contracts Act the appellant is accordingly entitled to a refund of the premium.

Another point raised is that the court should regard the agreement (AB 3-11) as a valid tenancy on a month-to-month basis. The principle relied on is that when a purported lease is construed as an agreement it goes without saying that as between the parties the agreement is enforceable just as any valid contract for land dealing. It may be specifically enforced. If in the circumstances of the case the court would not order specific performance the agreement may form the basis of a claim for damages or breach of contract.

But we would hasten to point out that unlike the appellant in *Margaret Chua* v. *Ho Swee Kiew & Ors.*[4] who was at all material times the registered proprietor of the land, the respondent here was not and that the device used by him in the agreement was for the purpose of deceiving the state authority. In *Margaret Chua* the trial Judge was of the opinion (and the Court of Appeal agreed with him) that although the agreement might be a nullity as a lease it could be a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease. That judgment followed a long line of authorities (see *Parker* v. *Taswell*).[5]

The evidence in this case however showed that the basis of the relationship of landlord and tenant was formed after the repudiation by respondent (AB 12) and the various correspondences and admissions in court.

Let us recapitulate. On May 22, 1980 PW 1 received a letter (AB 12) from the respondent's solicitors dated also May 22, 1980 informing him that the respondent was not the registered owner of the premises but that the true and proper owner of the premises was one Chan Kim Heng of No. 2723 Jalan Tok Hakim, Bandar Kota Bharu, Negeri Kelantan. This person later gave evidence as DW 3 admitting this fact. However PW 1 in spite of the notice (AB 12) still continued to rely on the agreement – page 18. The agreement had provided that the tenancy would commence from April 1, 1980. Subsequently this commencement of the tenancy was extended on three occasions by correspondence AB 14, AB 16, AB 17 to July 25, 1980 and then finally to August 31, 1980. PW 1 sent the notice to rescind the contract on November 18, 1980. It was expressly stated in that letter that up to that date the premises was still not ready for occupation. Both the learned President and the learned Judge held however that the respondent was not to blame if PW 1 found that electricity supply was inadequate for the purposes of the appellant's use. But in our view this finding is contrary to all the evidence properly considered. For the respondent, in his own evidence, admitted that the delay in commencing the tenancy was because there was no electricity (page 24). When referred to the notice to rescind the agreement, respondent said (page 25):

"AB 18 is a notice rescinding the tenancy agreement. I gave AB 18 to my solicitor. The electricity was in early part of November '80.

After electricity was installed PW 1 came to see me. He told me that the electricity was not enough."

On the evidence it is clear that until November 1980 no electricity supply at all was available at the premises concerned. As stated in the letter to the appellant dated November 27, 1980 (page 118) the respondent notified the appellant that only then "the premises is now ready for occupation, electricity having been installed". Thus as seen from the evidence it is absolutely clear that the sole reason for the delay was the installation of electricity into the premises. The question of inadequacy of electricity came later.

Thus it may be true that the respondent did not know how much electricity was required by the appellant in the premises until November 1980 but there is no evidence to show that even the normal supply of electricity was available before November 27, 1980. What is clear from the evidence is therefore the following:—

(a) the appellant had agreed to extend the time of commencement of the tenancy up to but not later than August 31, 1980;

(b) the respondent admitted in the letter dated November 27, 1980 that the premises was ready for occupation only then.

To summarise, the agreement expressed in the various letters exchanged between the parties after the notice of repudiation (AB 12) by the respondent was that the parties agreed to have a tenancy commencing from April, 1980 and extended finally by mutual consent to August 31, 1980 conditional upon installation of electricity into the premises. It has been established beyond doubt both by letter dated November 27, 1980 and the respondent's own testimony that the respondent was unable to have electricity installed until November 1980. There is therefore no doubt that the appellant was entitled to rescind the agreement on November 18, 1980.

As regard the claim for damages, the claim for damages in respect of the void agreement does not arise. In any case the appellant have themselves to blame to continue to deal with the respondent knowing that he was not the registered owner. The claim for damages in respect of the subsequent agreement has not been supported by satisfactory evidence. PW 1 only said he had "incurred $2,200/- as expenses". This bare statement cannot be a satisfactory basis for an award of damages in the circumstances of the case. The claim for damages is accordingly dismissed.

There shall be an order of 8% per annum interest on the sum of $15,000/- from the date of judgment of the learned President (August 1, 1980).

Appeal is allowed with costs to the appellant here and the court below.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.; C. Jegathesan & Co.*

GANAM D/O RAJAMANY v. SOMOO S/O SINNAH

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) February 8, March 20 & July 14, 1984]

[Kuala Lumpur — Federal Court Civil Appeal No. 151 of 1982]

Land Law — Sale of land — Specific Performance — Acknowledgement of receipt of deposit in agreement of sale — Whether open to vendor to prove consideration not paid — Whether time essence of contract — Discretion of court in decreeing specific performance — Contract rescinded — Damages — Specific Relief Act, 1950, ss. 21, 23, 24 & 36 — Contracts Act, 1950, s. 56.

Evidence — Acknowledgement of receipt of deposit in agreement of sale — Whether open to vendor to prove consideration not paid — Evidence Act, 1950, ss. 91 & 92.

In this case the appellant had agreed to sell her lands to the respondent. At the time of signing the contracts the appellant orally agreed to allow the respondent to enter into occupation of one of the properties but she alleged that the respondent had wrongfully entered on the other properties also. The respondent had failed to pay the balance of the purchase price and the appellant purported to rescind the contracts. She then brought an action to claim that the contracts had been effectively rescinded, forfeiture of the deposits, damages for trespass, mesne profits and ancillary relief. The learned Judicial Commissioner, who heard the case, found (a) that the actual selling price was $90,000-00 as claimed by the appellant; (b) that the actual date of completion was 31.3.77 as claimed by the appellant; (c) that the first property was leased to the respondent and the respondent agreed to pay $1,000-00 at the end of each padi harvest every six months; (d) that the respondent had paid $36,000-00 to the appellant or her agent; (e) and that time was not made the essence of the contract. Since he found that the respondent was ready and willing to complete the sale, he ordered the contracts to be specifically performed. The claim of the appellant was therefore dismissed. The appellant appealed against the decision of the learned Judicial Commissioner on questions (d) and (e) as well as the order directing specific performance of the contracts.